IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12849 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

@

KHEMCHAND REVIDAS VIASHNAV THRO WIFE GAURIBEN K VAISHNAV
Versus
DISTRICT MAGISTRATE

Appearance:
1. Special Civil Application No. 12849 of 2000
MR NM KAPADIA for Petitioner No. 1
Mr. H.L. Jani, AGP for Respondent No. 1-3
RULE SERVED BY DS for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 09/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Kapadia for the petitioner and the learned AGP Mr. Jani for the respondents. In this petition under Article 226 of the

the Constitution of India, the petitioner has challenged the impugned order of detention dated 1.4.1999 actually executed on 7th December, 2000 passed by the District Magistrate, Panchmahals at Godhra whereunder the petitioner has been ordered to be detained at the District Jail, Bhavnagar as Class II detenu. According to the grounds of detention communicated to the petitioner under section 9(1) of the Gujarat Prevention of Anti Social Activities Act, ("the PASA Act" for short), in all, the petitioner has been involved in two registered offences under the provisions of the Bombay Prohibition Act on date 31st December, 1998 and 2nd February, 1999 respectively. As per the grounds of detention, the petitioner has been involved in two unregistered offences dated 12th January, 1999 and 15th January, 1999. FOur statements of the secret witnesses recorded on 4th January, 1999 by the concerned police authority were verified by the Dy. S.P. on 29th January, 1999 and were again verified by the Sub Divisional Magistrate, Godhra on 9th February, 1999. However, these statements of the secret witnesses were not verified by the detaining authority himself though privilege u/s.9(2) of the PASA Act has been claimed by the detaining authority. In this matter, no reply has been filed by the respondents.

2. Learned advocate Mr. Kapadia has raised various contentions while challenging the impugned order of detention. He has submitted that the statements of the secret witnesses were not verified by the detaining authority himself while forming the subjective satisfaction and, therefore, the subjective satisfaction is not established from the record and, therefore, it amounts to non application of mind by the detaining authority. According to him, non verification of the statements of the secret witnesses by the detaining authority himself has vitiated the subjective satisfaction of the detaining authority and the claim of privilege without verifying the genuineness of the statements made by the secret witnesses is not justified. On this ground alone, according to him, the impugned order is required to be quashed and set aside. He has also drawn attention of this court to page 47 which is an order of bail passed by the court concerned which is an illegible document. He has submitted that the supply of illegible document has deprived the petitioner of his right to make an effective representation under Article 22(5) of the COnstitution of India and it amounts to non communication of grounds and, therefore, the impugned order of detention is required to be quashed and set

aside.

Learned AGP Mr. Jani has not been able to controvert the submissions made by Mr. Kapadia that the statements of secret witnesses recorded by the police authority have not been verified by the detaining authority himself. Learned AGP Mr. Jani has, however, supported the impugned order of detention by submitting that all these are technical defects or clerical error which can be condoned by the Court and looking to the merits of the matter, there were compelling circumstances justifying the detention of the petitioner and, therefore, this court should not interfere with the impugned order of detention.

I have considered the submissions made by both the learned advocates. I have considered the undisputed facts on record that the statements of the secret witnesses have not been verified by the detaining authority himself while forming the subjective satisfaction though claim of privilege was made under section 9(2) of the PASA Act which has affected the right of the petitioner to make an effective representation under Article 22(5) of the Constitution of India. While forming the subjective satisfaction, it is the duty of the detaining authority to satisfy himself about the genuineness of the statements made by the secret witnesses by examining such statements by himself. According to my view, this would amount to exercise of power without application of mind in a routine manner. While claiming privilege under section 9(2) of the PASA Act, some more care is required to be taken by the detaining authority to verify the genuineness of the statements of the secret witnesses by verifying such statements by himself. In this case, no such care has been taken by the detaining authority before passing the impugned order of detention and therefore, it has adversely affected the petitioner's right to make an effective representation under Art. 22(5) of the Constitution of India. No reply has been filed by the respondents in this petition.

In case of Kalidas Chandubhai Kahar v. State of Gujarat and others reported in 1993(2) GLR pg. 1659, the Division Bench of this Court has held as under in para 6 of the report :

"6. His second contention is that the detaining authority has wrongly exercised the powers under section 9(2) of PASA Act and by such wrong exercise of powers, the detenu, right to

make a representation under Art. 22(5) of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda City on 16th October, 1992. It has been pointed out by the learned AGP Mr. Y.M. Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under section 9 (2) of PASA, a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art. 22(5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under sec. 9(2) carved out on the basis of Article 22(5) of the Constitution which provides that nothing in sub sec.(1) shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it confers the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under sec. 9(2) of the PASA. Looking to the

> facts and circumstances of the case, it is clear, as stated hereinbefore that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under sec. 9(2), as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day i.e. 17th October, 1992, nor is there any material to show as to how he examined the necessity of exercising the power under sec. 9(2). Under the circumstances, in our view, it is a wrong exercise of power under sec. 9(2) which has affected the detenu's right of making an effective representation under Article 22(5) of the COnstitution of India and, therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

Aforesaid decision has also been considered by this court in decision reported in 2000(3) GLR 2696.

Considering the contention raised by the petitioner that the detaining authority himself has not verified the statements of the secret witnesses and also considering the second contention raised by Mr. Kapadia about supply of illegible document namely page 47 which is an order of bail passed by the competent court, and also considering the aforesaid decisions, as per my view, it would amount to non supply of document and non communication of ground affecting the petitioner's right to make an effective representation guaranteed under Article 22(5) of the COnstitution of India, and, therefore, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 1.4.1999 actually executed on 7th December, 2000 is vitiated and resulted to quash and set aside. The detenu Khemchand Revidas Vaishnav who has been presently detained at the Bhavnagar District Jail, be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

9.7.2001. (H.K. Rathod,J.)
Vyas